

Chapter 2: Types of Contempt of Court



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2.1 Distinguishing Civil and Criminal Contempt

"[I]t may not always be easy to classify a particular act as belonging to either one of these two classes [civil or criminal contempt]." *Bessette v W B Conkey Co*, 194 US 324, 329 (1904). This is so in part because a permissible sanction for both civil and criminal contempt of court is incarcerating the contemnor. See *In re Contempt of Dougherty*, 429 Mich 81, 90–91 (1987).

However, prior to the initiation of a contempt proceeding, it is necessary to distinguish between civil and criminal contempt because some, though not all, of the procedural safeguards applied in ordinary criminal proceedings apply to criminal contempt proceedings. *Id.* at 91. See also *People v Johns*, 384 Mich 325, 331 (1971), and *Sands v Sands*, 192 Mich App 698, 702–03 (1992) (where defendants were not informed until sentencing that they were found in criminal contempt, convictions must be reversed).

To distinguish civil from criminal contempt, it is necessary to look at the purpose of the sanctions. If the purpose of the sanction is to punish the contemnor for a past act that he or she was forbidden to do, criminal contempt proceedings may be instituted. If, on the other hand, the purpose of the sanction is to coerce the contemnor to do an act for the benefit of the

complainant, then civil contempt proceedings are appropriate. See *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 715–16 (2000).

The Michigan Supreme Court's most recent detailed discussion of the distinction between civil and criminal contempt is contained in *In re Contempt of Dougherty*, *supra*.

A. *In re Contempt of Dougherty*

In *Dougherty*, defendants were found in civil contempt of court for violating a permanent injunction prohibiting them from trespassing on the plaintiff's property and hindering access to and egress from plaintiff's industrial plant. The defendants were jailed until they promised not to violate the injunction in the future. The Supreme Court held that the trial court erred by imposing a coercive sanction to compel future compliance with the injunction where there was only a past violation of the injunction. Because the violation occurred in the past and the defendants were in compliance with the injunction at the time of the contempt hearing, the trial court was limited to instituting criminal contempt proceedings and imposing criminal contempt sanctions upon defendants, or to issuing a civil contempt order compensating plaintiffs for actual losses caused by defendants' actions. *Id.* at 87.

In so holding, the *Dougherty* majority adopted the general test for distinguishing civil and criminal contempt set forth in *Gompers v Bucks Stove & Range Co*, 221 US 418, 443 (1911), and restated in *People ex rel Attorney General v Yarowsky (In re Smith)*, 236 Mich 169, 171–72 (1926). *Dougherty*, *supra* at 95–96. This test states:

“The distinction between refusing to do an act commanded,—remedied by imprisonment until the party performs the required act; and doing an act forbidden,—punished by imprisonment for a definite term; is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment.” *Dougherty*, *supra* at 94.

In applying the *Gompers* test, the majority in *Dougherty* first emphasized the importance of distinguishing between civil and criminal contempt. Although difficult to make, the distinction between civil and criminal contempt is “often critical,” the Court stated, “since a criminal contempt proceeding requires some, but not all, of the due process safeguards of an ordinary criminal trial* and because the purpose sought to be achieved by imprisoning a civil contemnor (coercion) varies significantly from the purpose of imprisoning a criminal contemnor (punishment).” *Id.* at 91 (footnote omitted).

*See Section 3.2 for a detailed discussion of these procedural safeguards.

The *Dougherty* majority then noted that the distinction between civil and criminal contempt has in essence been codified at MCL 600.1715 (indefinite coercive sanction is permitted only where contemnor still has power to perform act required by court order), and added that MCL 600.1721 provides for compensatory sanctions where the contumacious conduct “has caused actual loss or injury to any person. . . .”*

*See Sections 4.2(C) and 4.3 for discussion of these statutory provisions.

B. Contemnor Must Be in Present Violation of the Court’s Order for Coercive Remedy to Be Imposed

The *Dougherty* majority reasoned that coercive contempt sanctions were inappropriate in the case before it because the contemnor was not in present violation of the court’s order. The Court admitted that, in certain cases, a coercive civil sanction may be appropriate where the contemnor has committed a past forbidden act. *Dougherty, supra* at 99. However, for a civil contempt sanction to be imposed in such a case, there must be “some act that can be coerced by the sanction. . . .” *Id.* “[A] coercive sanction is proper where the contemnor, at the time of the contempt hearing, is under a present duty to comply with the order and is in *present violation* of the order.” *Id.* (Emphasis in original.) The Court used the following example to illustrate:

“A court enjoins a defendant from striking. The defendant strikes and a contempt hearing is held. At the hearing defendant is under duty to obey the order and, if he is still on strike, is presently violating the order. Therefore, a coercive sanction, such as a \$100 fine for each day he remains on strike, is entirely proper.” *Id.* at 99–100, citing *United States v United Mine Workers*, 330 US 258 (1947).

C. Anticipatory Contempt

The concept of “anticipatory contempt,” or holding a person in contempt of court for refusing to promise to obey a court’s order in the future, has been repudiated by both state and federal courts. See *In re Contempt of Dougherty*, 429 Mich 81, 104–07 (1987), and cases cited therein. In *United States v Johnson*, 736 F2d 358, 360 (CA 6, 1984), one of the cases cited by *Dougherty*, the Court held that it was an improper use of the contempt power to impose coercive sanctions against a witness who stated his intention to refuse to testify at the criminal trial of alleged accomplices.

Note: The Michigan Supreme Court in *Dougherty, supra* at 111–12, criticized the trial court for requiring the contemnors to promise to obey the injunction in the future *in order to purge themselves of the contempt*.* However, one commentator believes that the *Dougherty* case can be read to allow a court to require promised future compliance in order to purge the contempt, where a coercive sanction was properly imposed in

*See Section 2.2(G), below, for discussion of a contemnor’s ability to purge contempt.

the first instance (i.e., where the contemnor was under a present duty to comply and in violation of the order at the time of the hearing). See Tahvonen, *Contempt: recent developments*, 1 Colleague 1, 7 (1988).

2.2 Comparing Civil and Criminal Contempt Proceedings

A. Purpose for Imposing Sanctions

*For a detailed discussion of sanctions, see Chapter 4.

In general, the sanctions for civil contempt are coercive and remedial in nature.* They are intended to compel compliance with a court's directives by imposing a conditional sanction until the contemnor complies or no longer has a duty or the ability to comply. *Jaikins v Jaikins*, 12 Mich App 115, 120 (1968), *Sword v Sword*, 399 Mich 367, 379 (1976), and *In re Contempt of Dougherty*, 429 Mich 81, 98–100 (1987). Thus civil contemnors carry “the keys of their prison in their own pocket.” *In re Nevitt*, 117 F 448, 461 (CA 8, 1902), quoted in *Harvey v Lewis (Appeal of List)*, 10 Mich App 709, 715 (1968). See also MCL 600.1715(2) (coercive commitment must end when contemnor performs the required act or no longer has the ability to do so).

The sanctions for criminal contempt are punitive in nature. They are intended to preserve the court's authority by punishing past misconduct through imposition of a fixed sanction where there is no opportunity or need for the court to compel the contemnor's compliance with its order. *In re Contempt of Rochlin (Kane v Rochlin)*, 186 Mich App 639, 647–48 (1990). In *In re Contempt of Rapanos*, 143 Mich App 483, 496–97 (1985), the Court of Appeals concluded that defendant was properly punished for criminal contempt where defendant ignored the trial court's order to immediately return business records to defendant's business partner for eight months and committed new violations by taking more records during that period. While taking the additional records, defendant affronted the dignity of the court by stating that “he could do anything he wanted to.” *Id.* at 497. The defendant's actions impaired the ongoing operation of the business and delayed the underlying litigation. *Id.* at 497–98.

B. Types of Sanctions That May Be Imposed

*The Court uses the term “fine” here to describe what §1721 of the Revised Judicature Act refers to as “damages.”

Two types of sanctions may be imposed in civil contempt proceedings: coercive sanctions, to force compliance with a court order, and compensatory sanctions, to compensate persons injured by the contumacious conduct. *In re Contempt of Dougherty*, 429 Mich 81, 97 (1987), *In re Contempt of Rochlin (Kane v Rochlin)*, 186 Mich App 639, 646–47 (1990), and MCL 600.1721. “Where compensation is intended, a fine* is imposed, payable to the complainant. Such fine of course must be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the

basic controversy.” *United States v United Mine Workers*, 330 US 258, 304 (1947). The court may also require contemnor to pay civil fines and the costs and expenses of the proceedings. MCL 600.1715(2).

In a criminal contempt proceeding, the court may impose an unconditional and fixed jail sentence, a penal fine, or both. *Cross Co v UAW Local No 155 (AFL-CIO)*, 377 Mich 202, 223-224 (1966). Under the general contempt statutes in the Revised Judicature Act, the jail sentence may be up to 30 days and the fine may be up to \$250.00. MCL 600.1715(1). The contemnor may also be ordered to pay damages to any person who has suffered an actual loss or injury as a result of the contumacious conduct. MCL 600.1721.*

The nature of the fine imposed may itself determine whether civil or criminal proceedings are required. In *United Mine Workers v Bagwell*, 512 US 821 (1994), the trial court found the union in contempt for unlawful strike-related activities. The trial court announced that it would impose a civil fine of \$100,000.00 for each violation involving violence and \$20,000.00 for each non-violent violation. When the union violated the injunction, it was found in contempt of court and ordered to pay \$52 million in fines to the state and two counties. The United States Supreme Court held that the fines were criminal, not civil, and reversed the trial court’s decision because the union was not afforded the right to jury trial. The fines were not compensatory, and announcing them in advance did not render them coercive because the union had no opportunity to purge itself of the contempt by complying with the trial court’s order after the fines were imposed. “The union’s ability to avoid the fines was indistinguishable from the ability of any ordinary citizen to avoid criminal sanction by conforming his behavior to the law.” *Id.* at 837.*

C. Intent of the Contemnor

Wilfulness is not a necessary element of civil contempt. *McComb v Jacksonville Paper Co*, 336 US 187, 191 (1949), *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 499–501 (2000), and *Catsman v City of Flint*, 18 Mich App 641, 646 (1969). Writing for the majority in *McComb*, *supra* at 191, Justice Douglas explained why wilful intent is not required for civil contempt:

“The absence of wilfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. . . . Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents. It laid on them a duty to obey

*See Section 4.3 for a discussion of the availability of compensatory damages in criminal contempt proceedings.

*See Section 2.2(G), below (contemnor’s ability to purge contempt).

specified provisions of the statute. An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently.” (Citations omitted.)

An essential element of criminal contempt is that the defendant acted wilfully. *People v Matish*, 384 Mich 568, 572 (1971), and *People v Kurz*, 35 Mich App 643, 652 (1971). “Willfulness . . . implies a deliberate or intended violation, as distinguished from an accidental, inadvertent or negligent violation.” *Vaughn v City of Flint*, 752 F2d 1160, 1168 (CA 6, 1985).

In *People v Little*, 115 Mich App 662 (1982), a criminal defendant moved to withdraw his guilty plea, claiming that he had lied during the plea proceeding. The judge issued an order to show cause why defendant should not be held in contempt. Defendant’s attorney testified at the show-cause hearing that he advised defendant to plead guilty because “the case was unwinnable.” The Court of Appeals reversed the criminal contempt citation, finding that it was not proved beyond a reasonable doubt that defendant’s false statements at the plea proceeding were culpable. *Id.* at 665.

D. Standard of Proof

The standard of proof for civil contempt is unsettled. Some cases hold that proof of the contumacious conduct must be “clear and unequivocal.” See, e.g., *In re Contempt of Calcutt (Calcutt v Harper Grace Hospitals)*, 184 Mich App 749, 757 (1990). For a different view, see *Jaikins v Jaikins*, 12 Mich App 115, 121 (1968) (applying a preponderance of evidence standard) and MCR 3.708(H)(3) (“clear and convincing” evidence standard applied in civil contempt proceeding after an alleged violation of a personal protection order).

In cases of criminal contempt, it must be proved beyond a reasonable doubt that the individual engaged in a wilful disregard or disobedience of the authority or orders of the court. *In re Contempt of Rapanos*, 143 Mich App 483, 488–89 (1985).

E. Primary Interested Party

The primary interested party* in a civil contempt proceeding is the person or persons who are being harmed by the contemnor’s refusal to obey a court order. These persons are usually the parties in a case. *People ex rel Attorney General v Yarowsky (In re Smith)*, 236 Mich 169, 171–72 (1926), quoting *State v Knight*, 3 SD 509 (1893). See also *In re Pecora (United States v Russotti)*, 746 F2d 945, 949 (CA 2, 1984), where the court stated that, in the context of civil litigation, “a civil contempt for failure to obey a court order may not be initiated by the trial judge, but is a remedy available only for the benefit of the parties who obtained the order in issue.”

*See Section 3.6 for a discussion of who may initiate contempt proceedings.

The primary interested parties in a criminal contempt proceeding are, first, the court whose authority is being preserved, and, second, the public. The United States Supreme Court in *Bloom v Illinois*, 391 US 194, 201 (1968), characterized criminal contempt as follows:

“Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both. . . .

“Criminally contemptuous conduct may violate other provisions of the criminal law; but even when this is not the case convictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same. Indeed, the role of criminal contempt and that of many ordinary criminal laws seem identical—protection of the institutions of our government and enforcement of their mandates.”

F. Court’s Ability to Restore the Status Quo Ante

Many cases decided prior to *In re Contempt of Dougherty*, 429 Mich 81 (1987)* distinguish civil and criminal contempt of court using an “after the fact determination” as to whether the “status quo ante” can be restored. See, for example, *Jaikins v Jaikins*, 12 Mich App 115, 120–21 (1968).

*See Section 2.1, above, for a discussion of *Dougherty*.

Civil contempt proceedings are appropriate where the court is able to “restore the status quo ante.” If the court is unable to do so, criminal contempt proceedings are appropriate. *In re Contempt of Rapanos*, 143 Mich App 483, 496–98 (1985). In *Rapanos*, the Court of Appeals concluded that defendant was properly punished for criminal contempt where defendant ignored the trial court’s order to return business records to defendant’s business partner for eight months. The Court held that defendant’s retention of the business records so disrupted the injured party’s business that the status quo could not be restored.

The ability to “restore the status quo ante” means that the court is able to do one of two things. The court may be able to compel the contemnor to act in accordance with the original court order. The type of sanction usually used to accomplish this is a conditional jail sentence. See *Harvey v Lewis (Appeal of List)*, 10 Mich App 709, 716 (1968), and *Watters v Watters*, 112 Mich App 1, 10 (1981).

Alternatively, the court may be able to put the injured parties in the same position they were in prior to the contumacious conduct. The type of sanction usually used to accomplish this is a financial penalty payable to the court or to the injured party. It is sometimes coupled with a conditional jail sentence that must be served until the contemnor complies with the court’s

order to pay the financial penalty. See *In re Jacques*, 761 F2d 302, 305-306 (CA 6, 1985), and *United States v United Mine Workers*, 330 US 258, 302 (1947).

G. Contemnor’s Ability to Purge the Contempt

In civil contempt proceedings, the contemnor must be given an opportunity to purge himself or herself of the contempt by complying with the conditions set by the court to remedy the situation. *Casbergue v Casbergue*, 124 Mich App 491, 495 (1983).

In a criminal contempt proceeding, because the penalty is unconditional and fixed and is imposed as punishment for past misconduct, the contemnor does not have the ability to purge himself or herself of the contempt. *State Bar v Cramer*, 399 Mich 116, 128 (1976).

2.3 Table 1: Comparison of Civil and Criminal Contempt of Court

	Civil Contempt	Criminal Contempt
Purpose for Imposing Sanction	Coercive: to compel compliance with court’s order by imposing punishment for indefinite term until contemnor complies or no longer has ability to comply. At time of hearing, contemnor must be under a duty to comply with and be in violation of court’s order. Compensatory: to indemnify for loss caused by contemnor’s conduct.	Punitive: to preserve the court’s authority and dignity by punishing past disobedience of court’s order. Compensatory: to indemnify for loss caused by contemnor’s conduct.

	Civil Contempt	Criminal Contempt
Sanctions That May Be Imposed		
<i>Monetary</i>	Fine (limited to \$250.00 per single contumacious act), costs, and expenses of proceedings; damages for injuries resulting from contumacious conduct, including attorney fees.	Limited to \$250.00 fine per single contumacious act, unless statute provides otherwise; damages for injuries resulting from contumacious conduct, including attorney fees.
<i>Jail</i>	Contemnor may be incarcerated indefinitely until compliance or contemnor unable to comply. Incarceration is indeterminate and conditional.	Limited to 30 days per single contumacious act, unless statute provides otherwise. Incarceration is fixed and absolute.
Intent of Contemnor	Wilfulness is not required.	Wilfulness is required.
Primary Interested Party	Injured person(s). May be the court, but is usually one of the litigants in the underlying action.	Usually the court and/or the public.
Court's Ability to Restore Status Quo Ante	Status quo ante can be restored through coerced compliance, or it is still possible to grant the relief ordered in the original court order.	Status quo ante altered so that it cannot be restored, or relief ordered in original court order can no longer be obtained.
Contemnor's Ability to Purge Contempt	Contemnor must be given opportunity to purge by complying with conditions set by the court.	Contemnor has no opportunity to purge.

2.4 Direct Contempt (“Summary Contempt Proceedings”)

A. “Immediate View and Presence”

Direct contempt of court occurs “during [the court’s] sitting” and in the “immediate view and presence of the court.” MCL 600.1701(a). The Michigan Supreme Court defined “immediate view and presence” as follows:

“‘[I]mmediate view and presence’ are words of limitation, and exclude the idea of constructive presence.

The immediate view and presence does not extend beyond the range of vision of the judge, and the term applies only to such contempts as are committed in the face of the court. Of such contempts, he may take cognizance of his own knowledge, and may proceed to punish summarily such contempts, basing his action entirely upon his own knowledge. All other alleged contempts depend solely upon evidence, and are inferences from fact, and the foundation for the proceedings to punish therefor must be laid by affidavit.” *In re Wood*, 82 Mich 75, 82 (1890).

In *Wood*, the Michigan Supreme Court held that the alleged contemnor’s writing words of protest upon a check made out to the court but delivered to the court clerk was indirect contempt.

To punish contempt summarily, all necessary facts must be within the personal knowledge of the judge. *In re Scott*, 342 Mich 614, 619 (1955), quoting *Wood, supra*. Personal knowledge is absent when the judge must rely on the testimony of other persons to establish the case against the contemnor. *Scott, supra* at 619–22.

See also *Schoensee v Bennett*, 228 Mich App 305, 318 (1998) (summary punishment of attorney was proper where attorney admitted during a hearing that merely seeking a stay from the Court of Appeals did not stay the trial court’s order, but the attorney indicated an intent to disobey the trial court’s order anyway), *In re Contempt of Barnett*, 233 Mich App 188, 190–91 (1998) (where information concerning the alleged contemnor’s statements in jurors’ presence was relayed to the judge by a bailiff, summary proceedings were improper), *In re Collins*, 329 Mich 192, 196 (1950) (filing of false pleadings may not be summarily punished), and *In re Contempt of Robertson (Davilla v Fischer Corp)*, 209 Mich App 433, 439–41 (1995) (witness’s failure to obey a subpoena may not be summarily punished because the reason for the witness’s absence is not within the personal knowledge of the judge).

*Note that summary proceedings are not mandatory. See Sections 3.3–3.4.

“When any contempt is committed in the immediate view and presence of the court, the court may punish it summarily by fine, or imprisonment, or both.”* MCL 600.1711(1). Thus, when direct contempt occurs, the proceedings are often referred to as “summary contempt proceedings.”

B. “During Its Sitting”

In MCL 600.1701(a), the phrase “during its sitting” is not as strictly limited as the term “immediate view and presence.” It includes the period of time when the judge is actually in the courtroom conducting judicial business. Therefore, if the contempt occurs in the courtroom during a period when the court has concluded one case and is about to proceed with another, it still qualifies as having occurred during “the sitting of the court.” *In re*

Contempt of Warriner (City of Detroit v Warriner), 113 Mich App 549, 552-554 (1982).

2.5 Indirect Contempt

Indirect contempt occurs outside the immediate view and presence of the court. Such contempt may not be punished summarily but only “after proof of the facts charged has been made by affidavit or other method and opportunity has been given to defend.” MCL 600.1711(2). MCR 3.606 contains the procedural requirements for indirect contempt cases.*

*See Chapter 3 for discussion of procedural requirements.

2.6 Summary: Elements of Contempt of Court

A. Direct Criminal Contempt

The elements of direct criminal contempt are:

- the wilful doing of a forbidden act, or the wilful refusal to comply with an order of the court,
- that impairs the authority or impedes the functioning of the court,
- committed in the immediate view and presence of the court,
- where the court seeks to punish misconduct that has altered the status quo ante so that it cannot be restored, or the relief sought by the original court order can no longer be obtained, or
- order in the courtroom cannot be restored unless criminal contempt sanctions are used.

B. Direct Civil Contempt

The elements of direct civil contempt are:

- the doing of a forbidden act, or the failure to comply with an order of the court,
- that impairs the authority or impedes the functioning of the court,
- committed in the immediate view and presence of the court,
- where the court seeks to coerce compliance and the contemnor is under a present duty to comply with the court’s order, is in present violation of the court’s order, and still has the ability to perform the act ordered by the court, or

- it is still possible to grant the relief originally sought by the court order, or
- it is still possible to restore order in the courtroom.

C. Indirect Criminal Contempt

The elements of indirect criminal contempt are:

- the wilful doing of a forbidden act, or the wilful refusal to comply with an order of the court,
- that impairs the authority or impedes the functioning of the court,
- committed outside the immediate view and presence of the court,
- where the court seeks to punish past misconduct and civil contempt remedies are inappropriate (the contemnor is not under a present duty to comply with and is not in present violation of the court's order, the conduct has altered the status quo ante so that it cannot be restored, or the relief sought by the original court order can no longer be obtained).

D. Indirect Civil Contempt

The elements of indirect civil contempt are:

- the doing of a forbidden act, or the failure to comply with an order of the court,
- that impairs the authority or impedes the functioning of the court,
- committed outside the immediate view and presence of the court,
- where the court seeks to coerce compliance and the contemnor is under a present duty to comply with the court's order, is in present violation of the court's order, and still has the ability to perform the act ordered by the court, or
- it is still possible to grant the relief originally sought by the court order.